SUPREME COURT OF YUKON

Citation: *Sheepway v. Hendriks*, 2019 YKSC 50

Date: 20190919
S.C. No. 17-AP017
Registry: Whitehorse

BETWEEN

DARRYL SHEEPWAY

PETITIONER

AND

ERIC HENDRIKS, **Assistant Deputy Superintendent (Whitehorse Correctional Centre)**
JAYME CURTIS, Superintendent (Whitehorse Correctional Centre)
TRISHA RATEL, Director of Corrections (Whitehorse Correctional Centre)

RESPONDENTS

Before Chief Justice R.S. Veale

Appearances:
Vincent Larochelle — Counsel for the Petitioner
Karen Wenckebach — Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case is about the conditions of Mr. Sheepway's incarceration in the Secure Living Unit of the Whitehorse Correctional Centre ("WCC") from August 31, 2016, to May 8, 2018, some 21 months pending trial and sentencing. He challenges the constitutionality of his incarceration under s. 7 of the *Charter of Rights and Freedoms.* He also challenges the legality of the Secure Living Unit under the *Corrections Act*, 2009, S.Y. 2009 c.3, as amended (the "*Corrections Act*"), the

Corrections Regulation, O.I.C. 2009/250, and the Yukon Corrections: Adult Custody Policy Manual effective January 1, 2012 and Revised October 25, 2016 (the "WCC Policy Manual").

[2] These Reasons will address the lack of definitional clarity, or what I call the label trap, which has bedevilled the laws of incarceration.

ISSUES

[3] Counsel have presented three main issues, among others:

1. Is the Policy B4.6 creating the Secure Living Unit authorized under the *Corrections Act* or *Corrections Regulation*, or is it beyond the power conferred? This issue will consider whether the Secure Living Unit can be created in a policy manual or whether it must be created in the *Corrections Act* and the *Corrections Regulation*.
2. Was Mr. Sheepway's confinement unconstitutional in that it breached Mr. Sheepway's s. 7 *Charter* rights to life, liberty and security of the person?
3. Is s. 21 of the *Corrections Regulation*, entitled Separate Confinement – longer term, a breach of s. 7 of the *Charter* or inconsistent with s. 2 of the *Corrections Act* and beyond the jurisdiction of the Commissioner in Executive Council?

[4] Section 7 of the *Charter* reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[5] Counsel for Yukon concedes that Policy B4.6 creating the Secure Living Unit does not meet the s. 7 requirement for procedural fairness and that the Court may make a declaration that Policy B4.6 and the Secure Living Unit is invalid to the extent that it does not provide sufficient procedural safeguards to WCC inmates. Counsel for Yukon makes this admission only for the purposes of the second part of s. 7 i.e. not to be deprived of those rights except in accordance with the principles of fundamental justice. However, counsel for Yukon submits that the policy in the WCC Policy Manual is valid law that is created pursuant to ss. 14 and 15 of the *Corrections Act*, which state that the person in charge of WCC must establish rules for, among other things, "the safe, secure and efficient operation of the correctional centre."

[6] I add that counsel for Mr. Sheepway is not applying for a declaration under s. 12 of the *Charter* that Mr. Sheepway's confinement was grossly disproportionate constituting cruel and unusual punishment.

THE WHITEHORSE CORRECTIONAL CENTRE

[7] WCC is a correctional facility for adults. It is the only adult correctional facility in Yukon, which houses both male and female inmates separately, and includes both inmates on remand and those who have been sentenced to a maximum sentence of two years less a day. It can house up to 190 inmates, though the population is frequently below that level. It is not uncommon for there to be about 70 inmates at the facility at any one time. Inmates in the general population may be double-bunked.

[8] Eric Hendriks is the Assistant Deputy Superintendent at WCC. He swore an extensive affidavit outlining Mr. Sheepway's incarceration and was cross-examined at the hearing. He is one of the persons responsible for supervising the placement of

inmates who are housed in the Secure Living Unit. His knowledge of Darryl Sheepway's placement is not personal but he states that he was informed by those who have personal knowledge. According to Mr. Hendriks, the considerations made in offering therapeutic programming differ for inmates on remand and inmates who have been sentenced. An inmate who is in WCC on remand is presumed innocent; because of this, he states there can be no assumption that the inmate requires rehabilitation and programming. As such, no formal assessment is done to determine an inmate's therapeutic requirements. This applies whether the remand inmate is in general population or the Secure Living Unit.

[9] Jayme Curtis has been employed as the Superintendent of WCC since July 29, 2013, which means he has been the person in charge of WCC during the incarceration of Mr. Sheepway. As of May 8, 2018, he has been acting as the Director of Corrections. As Superintendent, he was in charge of the safe, secure and efficient operation of WCC, the well-being of the inmates and the administration of the *Corrections Act*. He was also required to establish the rules for WCC pursuant to s. 15 of the *Corrections Act*.

[10] WCC has four living units for men who are in the general population and one living unit for women. Cells in the general population are unlocked at 7:00 a.m. to 10:30 p.m. and inmates are allowed to go out of their cells, have breakfast, and mix and mingle, which includes jobs and programming. There are certain routines such as making beds and five 20-minute breaks for guards when everyone returns to their cells for lockdown.

[11] Counsel and I took a view of the Segregation Unit and Separate Living Unit. The following descriptions apply to the male inmate population.

Segregation Unit

[12] There is one Segregation Unit, which has seven cells that are used for inmates who have committed disciplinary offences. This case is not specifically about segregation for disciplinary offences, but the location and conditions of the Segregation Unit are useful to consider in order to compare conditions. The Segregation Unit is on one side of the secondary control room (where doors can be opened and closed remotely) and the Secure Living Unit is on the other.

[13] There is no television in a Segregation Unit cell and there is reduced guard and inmate contact. Segregation Unit inmates are allowed out of their cells for "ablutions, fresh air, and telephone calls" limited to two hours daily. If the inmate is classified as separate confinement status, the inmate is allowed out of the cell for three hours daily.

[14] The Segregation Unit has a large common area and access to a fresh air room with a large barred window with no glass looking upon the grounds surrounding WCC. There is access to a telephone, shower and video unit for court appearances. An inmate in the Segregation Unit does not have contact with inmates in the general population.

Secure Living Unit

[15] There is one Secure Living Unit for men which consists of seven cells. Each cell in the Secure Living Unit has a small television and the seven cells have access to a common area. The common area has a telephone, treadmill, shower and "fresh air room" which has a large barred window with no glass. There is no specific minimum time the inmate is allowed to be out of his cell and into the common area as it is

dependent upon the number of inmates in the Secure Living Unit and a determination of inmate status and compatibility. It is possible that the inmate may be alone in the Secure Living Unit, which would result in no contact with fellow inmates or he could be compatible with other inmates with potential contact with one to six other inmates. An inmate in the Secure Living Unit does not have contact with the inmates in the general population.

[16] Placement recommendations and decisions for placing an inmate in the Secure Living Unit are discussed and confirmed at daily management briefings, which are chaired by Mr. Curtis as Superintendent.

[17] Since April 7, 2017, Mr. Hendriks began to sign the Secure Living Unit Placement Forms and deliver them to Mr. Sheepway advising him why he was in the Secure Living Unit. Mr. Hendriks reviewed the placement monthly.

[18] In addition to the Secure Living Unit Placement Forms, there are three types of written documents at WCC relevant to this case. The Inmates Progress Logs are running logs of an inmate's day written by the correctional officer who is on shift and observed the inmate.

[19] Case Management Notes are completed by case managers at WCC. They record rating assessments, therapeutic programming and work performed by inmates.

[20] Notes of Daily Management Briefings are taken at management meetings where inmates and problems are discussed.

DARRYL SHEEPWAY'S CONFINEMENT

[21] Darryl Sheepway was admitted to WCC on August 20, 2016, after his arrest on a charge of first-degree murder of Christopher Brisson in Whitehorse, Yukon, on August

28, 2015. He was found guilty of second-degree murder on January 30, 2018. He was sentenced on the murder conviction on May 8, 2018. On the same date, he was sentenced for eight counts of robbery and one count of attempted murder, which occurred in Ontario, between November 9, and 25, 2015.

[22] Although completely unrelated to his criminal charges, a salient feature of his confinement at WCC is the fact that he worked as a corrections officer at WCC for approximately five years, from August 3, 2007, to October 19, 2012.

[23] On August 20, 2016, Mr. Sheepway began his confinement in the Segregation Unit. The Daily Management Briefing Notes dated August 23, 2016 to August 31, 2016 when he was transferred to the Secure Living Unit, all made reference to separate confinement ss. 20 or 21 of the *Corrections Regulation*. He did not receive the procedural rights under ss. 21(3), (4) and (5) – Separate Confinement – longer term.

[24] From August 31, 2016 to May 18, 2018, Mr. Sheepway was placed in the Secure Living Unit. He did not receive the benefit of procedural rights under ss. 21(3), (4) and (5) of the *Corrections Regulation*.

[25] Security classifications were decided in case management. For example, on October 21, 2016, as a result of Mr. Sheepway requesting a security classification reduction, a Case Management Note indicated a decision:

> A security classification review was completed for Mr. Sheepway upon receiving a request from his asking about a security classification reduction.
>
> Mr. Sheepway will remain classified to MAX due to the following reasons:

> Policy D4.1:
>
> 16.1 – the inmate is remanded in custody and the nature of his offence does not warrant the reduced rating as a Secure inmate:
> 16.4 – the inmate poses a high risk of attempting to escape;
> 16.5 – the inmate requires a high degree of supervision and control within the correctional centre;
>
> Mr. Sheepway was provided, in writing, about the outcome of the review and the reasons he would remain classified as a MAX inmate.

[26] Mr. Curtis stated that Mr. Sheepway did not receive Secure Living Unit Placement Forms following management reviews of his placement until April 7, 2017. The delivery of the Secure Living Unit Placement Forms occurred following an inspection by the Investigation and Standards Office ("ISO"). The ISO has specific investigation powers pursuant to ss. 36 and 37 of the *Corrections Act*.

[27] On April 5, 2017, Mr. Sheepway made a Special Request for an inmate plan. On April 7, 2017, Mr. Hendriks provided a Secure Living Unit Placement Form indicating that WCC would continue to review progress but were not looking to move him out of the Secure Living Unit. Another Special Request by Mr. Sheepway on April 5, 2017, indicated that ISO directed that under its review pursuant to s. 42(4)(c) of the *Corrections Regulation*, WCC was required to give Mr. Sheepway written reasons and justification for his continuing placement in the Secure Living Unit. The ISO directions were not part of the record but it does not appear that WCC disputed Mr. Sheepway's reference to ISO directions, nor did WCC concede that the Secure Living Unit was subject to Separate Confinement in ss. 20 or 21 of the *Corrections Regulation.*

[28] Mr. Sheepway signed some Secure Living Unit Placement Forms and did not sign others. Although there is some variation in the wording of the Placement Forms,

the following on April 7, 2017, and July 19, 2017, which he signed, respectively are typical:

> You have been in custody since August 20th, 2016 and have serious charges and are awaiting trial in November of 2017. There are significant safety and security concerns to the facility that are unique to your circumstances as you were employed at this facility as a corrections officer and have intimate knowledge of the facility. In addition to this, there are safety and security concerns to your person given your previous employment and the nature of the charges which you are facing. In conversation with MCS HENDRIKS on April 6th, 2017, this was discussed with you and it was explained to you. You advised that you understood that you would not be moved and that the only unit you would be interested in moving to would be Golf unit so that you could work in the kitchen. As a remanded inmate, you are aware only sentenced inmates have a case manager for plans and programs. As discussed, MCS HENDRIKS will provide you with a written response in relation to other options that may improve your circumstances in the Secure Living Unit.
>
> …
>
> You have been in custody since August 20th, 2016 and have serious charges and are awaiting trial in November of 2017. There are significant safety and security concerns to the facility that are unique to your circumstances as you were employed at this facility as a corrections officer and have intimate knowledge of the facility. In addition to this, there are safety and security concerns to your person given your previous employment and the nature of the charges which you are facing. In conversation with MCS HENDRIKS on April 6th, 2017, this was discussed and it was explained to you that you would not be moved. Since your last review with MCS HENDRIKS on June 5th, you have been challenging unit officers in a passive resistive manner despite efforts to improve conditions and privileges in the Secure Living Unit. MCS HENDRIKS has reviewed special requests,38969, 38970, 39093. These were submitted on June 17th and responses will be given to you in a separate memo. You have mentioned deterioration of your mental health during your incarceration. You have been provided counselling services and WCC will continue to support this. MCS HENDRIKS has also advised you that there may

> be less restrictions for you in another facility and that you might consider requesting a transfer to another institution while you await your trial. You were advised that could submit a special request for consideration if you want to explore this option. To date, no such request has been received.

[29] In his affidavit, Mr. Hendriks considerably amplified the reasons for Mr. Sheepway's confinement in the Secure Living Unit.

[30] Each Secure Living Unit Placement Form has a Special Instruction section, which generally checked the boxes indicating normal clothing and bedding, normal meals, Fresh Air, Phone Calls, Television, Cell Searches, Secure Visits Only, Personals as per policy and No Population Restrictions.

[31] There were no restrictions for "on" unit but as of July 20, 2017, handcuffs were required for "off" unit. The July 21, 2017 Secure Living Unit Placement Form stated:

> Further to your review on June 19, your placement form has been updated to show restraints, handcuffs, for any moves off the unit. In order to minimize the restrictiveness of these measures Segregation and Secure Living Unit are deemed to be one unit. Your placement and special instructions/protocols will be reviewed before the end of the day on Friday, July 21.
>
> I understand that my placement in SLU will be reviewed regularly and I may be relocated based on operational requirement.

[32] Mr. Sheepway did not sign this Form.

[33] Mr. Sheepway states that he was never provided with the opportunity to make meaningful submissions about why his extended confinement in the Secure Living Unit was not necessary or to present alternatives.

[34] Mr. Sheepway and Mr. Hendriks have different views of his incarceration and I will address their views separately.

Mr. Sheepway's View

[35] Mr. Sheepway states that the Secure Living Unit is the mirror image of the Segregation Unit. He states that the difference between the Segregation Unit and the Secure Living Unit is minimal except for the television in his cell and the access to a stationary exercise bike and later elliptical equipment in the common area.

[36] He acknowledges that when he was in the common area there was access to a concrete "fresh air" room approximately eight square metres which had a screened view of outside WCC with outside fresh air.

[37] He states that the time spent outside his Secure Living Unit cell in the common area fluctuated from 2 – 5 hours a day. He states that he had no meaningful contact with other inmates until his petition was filed on February 20, 2018. Prior to that date, he said he would have to yell at other inmates through their cell doors to establish communication, which was very difficult. After the filing of his petition, he states that his conditions in the Secure Living Unit improved dramatically and he had more opportunity to interact with other inmates outside his cell in the Secure Living Unit.

[38] Mr. Sheepway was not aware of any attempt whatsoever to integrate him into the general population of WCC for trial and observation despite his repeated requests.

[39] He also said he was not aware of any attempt to integrate him into individual activities or programs with the general population for trial and observation.

[40] He states that his mental state had significantly deteriorated while at WCC. He describes his behaviour as excellent with no attempt to escape, threaten staff or other inmates nor attempting to harm himself. He acknowledges some non-compliant behaviour with orders from correctional officers as a protest.

[41] He also stated that being segregated and confined created feelings of despair and hopelessness as well as anger towards the correctional officers, WCC and authority generally, including the judicial system.

Mr. Hendriks' View

[42] Mr. Hendriks stated that Mr. Sheepway was able to spend between 3 – 6 hours out of his cell in the common area (described as "unlock time"). He stated that when Mr. Sheepway was the only inmate in the Secure Living Unit, he was allowed out of his cell for up to six hours a day. Telephones are located in the common area and Mr. Sheepway had unrestricted telephone access to his family and friends. There were also conversations with guards.

[43] Mr. Hendriks acknowledged that in September 2016 and part of December 2016, Mr. Sheepway was in the Secure Living Unit with incompatible inmates which meant he was unlocked alone which was at least 3 hours per day.

[44] Although the Daily Management Briefing on September 13, 2016, indicated Mr. Sheepway refused time out of his cell, on Monday, October 31, 2016, and November 17, 2016, he clearly indicated a desire to be confined with the other inmates in the general population. Mr. Hendriks, in his affidavit, gave a general picture that there were times when Mr. Sheepway would be on unlock times alone and with Mr. Barbier and others but it was subject to compatibility and changed on a regular basis.

[45] On one occasion, Mr. Sheepway was assaulted by a fellow inmate who learned of Mr. Sheepway's previous employment at WCC. From that point on they were categorized as incompatible.

[46] On April 7, 2017, Eric Hendriks advised Mr. Sheepway that he would not be leaving the Secure Living Unit while he was still on remand. But Mr. Hendriks noted that Mr. Sheepway was pleased with the exercise bike and was advised there would be an elliptical if possible. Mr. Sheepway also agreed to counselling with Nicole Bringsli, a clinical psychologist.

[47] On May 26, 2017, Eric Hendriks met Mr. Sheepway and they discussed the idea of transferring to another facility. Mr. Sheepway was reminded to put in a Special Request, although Mr. Hendriks stated that Mr. Sheepway could not be transferred to another institution while he was on remand.

[48] On June 1, 2017, Mr. Sheepway and another Secure Living Unit inmate were described as “rapidly going downhill” by a correctional officer.

[49] Mr. Sheepway acknowledged that he had visits with his mother when she was in Whitehorse which amounted to about ten visits over his entire incarceration. Some visits were over glass and some were open visits.

[50] Mr. Sheepway also had visits with his children every other week initially but the frequency was reduced by their guardian and not WCC.

[51] Mr. Sheepway declined to see the religious visitor available to inmates but he did have visits from Dr. Heredia, the psychiatrist and Nicole Bringsli, as previously noted. Mr. Sheepway saw Ms. Bringsli twice a month and expressed in court that he would have preferred to see Ms. Bringsli on a daily basis. Mr. Sheepway met with Nicole Bringsli approximately 17 times during his incarceration in the Secure Living Unit.

[52] Mr. Hendriks stated that there were many times that Mr. Sheepway did not come out of his cell during unlock time when he had compatible inmates to socialize with.

Mr. Sheepway agreed but said there was nothing to do and having his door open just meant a bigger empty room with inmates WCC considered compatible. Mr. Sheepway said merely being compatible, meaning no conflict, did not result in meaningful socialization.

[53] Mr. Hendriks also stated that efforts were made to provide programming to Mr. Sheepway. Nicole Bringsli attempted to have follow-up counselling from Alcohol and Drug Services, who had previously counselled Mr. Sheepway. Alcohol and Drug Services decline to provide counselling.

[54] Mr. Hendriks stated that Mr. Sheepway declined to take part in a 12-step substance abuse program. He met a Yukon College course instructor but did not pursue a course. He declined to take part in a dog therapy counselling program with a psychologist. He did take part in a smudging ceremony but was suspended for smoking sage. He refused to smudge under supervision.

[55] Mr. Sheepway did use the exercise bike periodically and requested an elliptical machine which was made available to inmates in the Secure Living Unit.

[56] He also started a job to clean the common area of the Secure Living Unit on October 19, 2016, for which he received remuneration that could be used at the canteen.

DR. LOHRASBE'S REPORT

[57] There are no reports in evidence from Dr. Heredia, the psychiatrist, or Ms. Bringsli, the clinical psychologist.

[58] Dr. Lohrasbe, a forensic psychiatrist, interviewed Mr. Sheepway on August 6, 2017, to address his mental state at the time of the homicide on August 28, 2015. His

report dated August 31, 2017, did not focus on Mr. Sheepway's mental state during incarceration and was not filed in this case. Dr. Lohrasbe interviewed Mr. Sheepway again at WCC on February 14, 2018, for a little over two hours to focus on the impact of him being incarcerated "in relative isolation (whether termed segregation or otherwise)", using Dr. Lohrasbe's words.

[59] Dr. Lohrasbe begins with the general principle that it is now well-established that prolonged periods of isolation can lead to a host of negative consequences for any person's mental health.

[60] He states that external and internal variables influence the kind and degree of mental health consequences. External variables are things like the physical layout of the cell, lighting, cleanliness, facilities, time outside the cell per day, frequency and duration of contact with other people including other offenders, visiting family, or correctional officers or health professionals. Internal variables are the pre-existing vulnerabilities of the offender.

[61] Dr. Lohrasbe then states that it is universally recognized that pre-existing psychiatric disorders render the individual especially susceptible to the negative effects of isolation. Ironically, Dr. Lohrasbe states that the very people most likely to be negatively impacted by isolation are those whom it is the most difficult to clearly demonstrate that isolation was the direct cause of subsequent symptoms.

[62] Dr. Lohrasbe then sets out the three "widely recognized principles" in the literature on the effects of isolation:

1. Necessity: Given the well-known negative consequences, use as a last resort.
2. Selectivity: Especially avoid with those who have preexisting mental vulnerabilities.

> 3. Duration: Keep as short as possible, since longer periods of isolation are much more likely to have severe and longstanding negative effects on the offender's mental health. (Lohrasbe's report, p. 2)

[63] Dr. Lohrasbe gives an excellent overview of the Secure Living Unit and Mr. Sheepway's placement in it:

> Mr. Sheepway told me that he is housed on a unit with seven cells, five of which can be double bunked and hence up to 12 inmates can be housed. Over the period of his stay at WCC, the numbers have typically been lower and on the date that I interviewed him there were only three inmates on the unit. However, during the first six to eight months of in incarceration at WCC the unit was full much of the time. Mr. Sheepway stated that WCC does not officially designate his unit as segregation but rather a 'secure/special living unit' or SLU. From his point of view however, other than access to a TV, *"nothing's different here from segregation"*.
>
> …
>
> Once in the central common room, Mr. Sheepway can approach the cell of any other offender if he wishes and have a conversation through the bars. Currently, since there are only three inmates on his unit, he is let out into the main central room two or three times a day, for one or two hours on each occasion. There is no fixed schedule. Correctional officers do a visual check of inmates in their cells every 30 minutes.
>
> Mr. Sheepway continues to see Nicole Bringsli roughly every second week for an hour. He sees Dr. Heredia every second or third week for a much shorter period of time, typically to review his medications (which remain the same, Seroquel, an antipsychotic and Pristiq, an antidepressant). He continues to be grateful for his medications as they help him sleep and he continues to want to sleep away as much of the day as he can. He typically gets 12 hours of sleep every night. (Dr. Lorhasbe's report, pp. 2 – 3)

[64] Dr. Lohrasbe concludes with his opinion that, at the time of his incarceration, Mr. Sheepway's cannabis and cocaine dependence dominated his mental state plus the

additional diagnosis of anxiety, and depressive or personality dysfunction. He acknowledged that WCC recognized this diagnosis and provided regular contact with a psychologist and psychiatrist.

[65] He was unable to tease out the effects of isolation on his pre-existing vulnerabilities or the effects of isolation from the effects of incarceration itself. He reported that Mr. Sheepway's intermittent suicidal ideation has declined in intensity.

[66] Dr. Lohrasbe concluded, at p. 4 of his report:

> He currently suffers from anxiety, depression, despair and suicidal thoughts, but those symptoms predate his incarceration. What is new and specific to his current placement are the particular manifestations of reactive anxiety with features of panic attacks and PTSD, which he endures during the screaming and banging by an agitated inmate. Loss of motivation and a sense of meaninglessness also predate his incarceration, and can be a manifestation of incarceration itself, but isolation can make them worse.
>
> In my view, returning to the basic principles is a reasonable approach to exploring what additional and needless harm to Mr. Sheepway's mental health could have been avoided if he had not been place[d] in relative isolation for the better part of two years. That is:
>
> Necessity; was it used as a last resort?
> Selectivity; given that his pre-existing mental vulnerabilities were recognized and he was seen by Dr. Heredia and prescribed psychoactive medications not long after admission, were any alternatives explored?
> Duration; was it necessary to keep him in relative isolation for all of his stay? (my emphasis)

[67] Generally speaking the discrepancies in the evidence of Mr. Sheepway compared to Mr. Curtis and Mr. Hendriks can be explained by the fact that Mr. Sheepway relied upon his memory and Mr. Curtis and Mr. Hendriks had the advantage of the recorded notes of correctional officers. Thus, where Mr. Curtis and

Mr. Hendriks had written records to rely upon, I generally accept their presentation of facts. On the other hand, I accept Mr. Sheepway's subjective view of the impact of segregation and the Secure Living Unit on his mental health.

[68] I find the following facts:

1. From my observation on a view of the Segregation Unit and the Secure Living Unit, the physical configuration of the Units are similar. It is the unlock times that differ. The unlock time out of the inmate's cell in the Segregation Unit is limited to two hours while the unlock time in the Secure Living Unit varies but may be three to six hours. The major difference is that the cells in the Secure Living Unit have a small television screen which are not in the cells in the Segregation Unit.
2. Mr. Sheepway was confined in the Segregation Unit for the first two weeks of his incarceration at WCC and did not receive any written reasons for his placement.
3. From August 31, 2016, to May 18, 2018, Mr. Sheepway was incarcerated in the Secure Living Unit. He did not receive Secure Living Unit Placement Forms until April 7, 2017.
4. In the Secure Living Unit, Mr. Sheepway had days when he had no inmate contact and days when he had inmate contact. At all times in that timeframe, he had access to a common room, telephone, exercise equipment, shower and secure access to fresh air but not necessarily with other compatible inmates. He also had visits with his mother, his children

and access to a psychologist and psychiatrist, the latter prescribing medication.

5. It is now well-established that prolonged periods of isolation can lead to negative consequences for any person's health. Pre-existing psychiatric disorders render individuals especially susceptible to the negative effects of isolation.

6. Mr. Sheepway entered WCC with cannabis and cocaine dependence, depressive or personality dysfunction and suicidal thoughts. WCC provided a psychiatrist to prescribe medication and a psychologist to meet with him. Both were beneficial to Mr. Sheepway.

7. At the time of Dr. Lohrasbe's report, dated March 15, 2018, Mr. Sheepway suffered from anxiety, depression, despair and suicidal thoughts which predated his incarceration. What is new are the particular manifestations of reactive anxiety with features of panic attacks and PTSD.

8. Subjectively, Mr. Sheepway stated that his mental health deteriorated significantly during his incarceration. Dr. Lohrasbe was unable to conclude that his "relative isolation" was the direct cause of his new symptoms, although he stated that it was universally recognized that pre-existing psychiatric disorders render an individual especially susceptible to the negative effects of isolation.

9. Although Mr. Hendriks discussed Mr. Sheepway's security status with him, WCC never followed the procedures in s. 21 or provided an appeal process.

THE LOUKIDELIS' WCC INSPECTION REPORT

[69] David Loukidelis, Q.C., a lawyer, teacher and former Deputy Attorney General and Deputy Minister of Justice of British Columbia, prepared an Inspection Report on WCC in May 2018 for the Minister of Justice pursuant to s. 36 of the *Corrections Act*. The mandate of Mr. Loukidelis was as follows:

> The Inspector will inspect the policies and practices of the Whitehorse Correctional Centre which involve, affect or may impact the mental health of clients; the Inspection shall include but is not limited to the use by the Whitehorse Correctional Centre of separate confinement and segregation of clients with mental illnesses.

[70] The Inspector was clear that his assessment was not a legal analysis under the *Charter of Rights and Freedoms.* He is not an expert in correctional security and neither counsel wished to cross-examine him.

[71] However, Mr. Loukidelis' discussion under the heading "What is separate confinement?" has relevance to the case at bar and I summarize his assessment from pp. 45 – 46 of his report:

1. It is not the label that is attached to where someone is held but the conditions of confinement that matter.
2. The National Segregation Strategy for Corrections in Canada observed that Canadian courts refer to the separation of inmates from the general institutional population as segregation. Mr. Loukidelis adopts that definition for separate confinement in his report.
3. In the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the "Nelson Mandela Rules"), the term used is solitary

confinement but it is defined by the conditions, i.e. confinement of prisoners for 22 or more hours a day without meaningful human contact.

4. He concludes that administrative separate confinement, whether short- or long-term amounts to solitary confinement.

[72] As Mr. Loukidelis did not explicitly refer to the Secure Living Unit in this section of his Report, with the agreement of counsel, I wrote to Mr. Loukidelis to question whether he would include the Secure Living Unit as "separate confinement". He replied in writing that Policy B4.6 together with other WCC policies "contemplated that an individual might be housed in the SLU under conditions amounting to what I considered to be 'separate confinement.'" Mr. Loukidelis confirmed that he examined the applicable laws and policies at WCC but he did not do a fact-finding investigation or review of the actual deployment of different forms of separate confinement at WCC.

THE LEGISLATION, REGULATION, AND WCC POLICY MANUAL

The *Corrections Act*

[73] The *Corrections Act* begins with a statement of Principles of corrections according to which the *Act* and *Regulation* must be interpreted and administered. I would not describe the principles of correction as having equal weight as s. 2(a) states that the protection of society must be given paramount consideration in making decisions or taking any action under the *Corrections Act*. However, s. 2(g) requires the Corrections Branch to use the least restrictive measures with offenders consistent with the protection of the public, staff members and offenders. Section 2(h) states that discipline and restrictions imposed on offenders otherwise than by a court are applied

by a fair process and with lawful authority, with access by the offender to an effective review procedure.

[74] The *Corrections Act* does not refer to the words “Secure Living Unit”. However, s. 14 makes the person in charge of WCC responsible under the supervision of the director of corrections, for among other things:

> 14(1) The person in charge is responsible, under the supervision of the director of corrections, for
>
> (a)the safe, secure and efficient operation of the correctional centre;
>
> …

[75] Section 15 states that :

> 15(1) The person in charge must establish rules, not inconsistent with this Act and the Regulations and subject to the approval of the director of corrections, respecting the matters referred to in section 14 [duties of person in charge] which must include rules respecting
>
> (a) the conduct of inmates of the correctional centre;
> (b) activities of inmates of the centre; and
>
> (c) other matters necessary or advisable for the maintenance of order and good management of the centre.
>
> (2) The person in charge must inform inmates of the correctional centre of the rules of the centre.
>
> (3) Inmates of a correctional centre must comply with the rules set by the person in charge. (my emphasis)

[76] Under the Power to make Regulations, s. 51 provides that the Commissioner in Executive Council may make Regulations:

> …
>
> (b) for the management, operation, and security of correctional centres;
>
> …
>
> (f) respecting the separate confinement or segregation of inmates;
> …
>
> (m) establishing rules governing the conduct of inmates in a centre, which may vary between centres;
>
> (n) providing that an inmate's breach of a rule referred to in paragraph (m) is a matter in respect of which the inmate may be disciplined;
>
> …
>
> (t) establishing a process for review of a decision made in a disciplinary hearing, and the powers and duties of a person conducting the review;
>
> …
>
> (dd) respecting any other matter that the Commissioner in Executive Council considers necessary or advisable to facilitate the administration of this Act. (my emphasis)

The Corrections Regulation

[77] The *Corrections Regulation* is divided into seven parts. For the purpose of this court case, Part 4 entitled Custody of Inmate is relevant and is divided into Division 1 and 2.

[78] Division 1, subtitled Security Measures contains, s. 20 entitled Separate Confinement – Short-Term and s. 21 entitled Separate Confinement – Longer-term.

[79] The person in charge may order an inmate to be confined separately if the person in charge believes on reasonable grounds that the inmate:

> …
>
> (iii) is jeopardizing the management, operation or security of the correctional centre or is likely to jeopardize the management, operation or security of the correctional centre,
>
> (iv) would be at risk of serious harm or is likely to be at risk of serious harm if not confined separately,
>
> (v) must be confined separately for a medical reason, or
>
> (vi) suffers from a mental illness;

[80] Section 20(2) requires the person in charge to release the inmate confined separately within 72 hours of the commencement of the confinement.

[81] Section 20(4) requires the person in charge to give notice to the person confined separately of the reasons for separate confinement.

[82] Section 21(1), separate confinement – longer-term, states that the person in charge may extend the short-term confinement for one or more periods of not longer than 15 days each as the review takes place before the inmate is released from separate confinement.

[83] Section 21(3) requires the person in charge in a situation of separate confinement – longer-term to give the inmate notice in writing of the reason for the long-term confinement, the duration of it and give the inmate a reasonable opportunity to say why the separate confinement should not continue or be for a shorter period of time.

[84] Section 21(4) requires written reasons to be given to the inmate after considering the inmate's submissions.

[85] Section 23 empowers the person in charge to terminate the separate confinement at any time.

[86] The *Corrections Regulation* does not define separate confinement but rather states the circumstances or grounds upon which the person in charge may confine an inmate separately.

[87] However, in ss. 26 – 36 covering hearings for disciplinary offences, the *Corrections Regulation* establishes a procedure for notice, the conduct of the hearing with the inmate present and an independent review by the director of standards and review.

WCC Policy Manual – Segregation B4.2

[88] The WCC Policy Manual creates the Segregation Unit under Policy B4.2. I refer to the Segregation Unit policy as it sets out a definition that includes a definition of Separate Confinement as follows:

> Separate Confinement Status: the custody status of inmates held in a cell within the Segregation Unit or the Secure Living Unit I under the provisions of sections 20-23 of the Regulations. (my emphasis)

[89] Under the title “Inmate rights in the Segregation Unit”, s. 5 addresses both Segregation Unit inmates and Separate Confinement status inmates as follows:

> 5.1 all Segregation Unit inmates have a right to be out of their cells for ablutions, fresh air and telephone calls. This right is limited to two hours daily for Segregation status inmates;
>
> …
>
> 5.3 separate confinement status inmates retain the same rights as inmates in normal units subject to the practical limitations posed by the Segregation Unit operation and the need to maintain separation between individual inmates or classes of inmates;
>
> …

> 5.6 inmate(s) separately confined shall be provided with written reasons for the placement within 24 hours of such placement;
>
> 5.7 long term separately confined inmates make may a submission to the Person in Charge why they feel a period of separate confinement should be discontinued or shortened; (my emphasis)
> …

[90] Although it is not specifically relevant to this case, I add s. 7 because it has a redaction as follows:

> s. 7- Unit staff shall maint [redacted]

[91] There are several provisions in the WCC Policy Manual with redactions.

WCC Policy Manual - B4.3 Separate Confinement

[92] In addition to the references to separate confinement under the Segregation Unit, the WCC Policy Manual has a separate policy for Separate Confinement with the following definitions:

> Separate Confinement: the custody status of inmates held in the Segregation Unit under the provisions of section 20-23 of the Regulations.
>
> Segregation: the custody status of inmates held in the Segregation Unit under section 28 and 33 of the Regulations.
>
> Review Committee: a committee charged with responsibility for reviews of separate confinement or segregation placement. (my emphasis)

Uses of Separate Confinement:

> 1. The Person in Charge will ensure that the use of separate confinement is consistent with the following principles:

> 1.1. separate confinement is a mechanism for separating inmates from one another in an environment that provides higher levels of security and physical separations as well as frequent monitoring.
>
> 1.2. separate confinement is not a disciplinary disposition and does not involve any finding of culpability.
>
> 2. Inmates may be placed in separate confinement of one or more of the reasons set out in s. 20(1) of the Regulations. …
>
> ...
>
> 18. Inmates will be encouraged to access services and exercise all rights available to them:
>
> 18.1. all separate confinement inmates have a right to be out of their cells for ablutions, fresh air and telephone calls; limited to 3 hours daily.
>
> 19. Any concerns about segregated inmates noted by any staff will be documented and brought forward for discussion at the daily review with senior management.
>
> Care of mentally ill inmates on Separate Confinement
>
> 20. Alternatives to separate confinement for inmates with mental health concerns will be explored, exhausted and documented before placing a mentally ill inmate in segregation. (my emphasis)

[93] In my view, the WCC Policy Manual, implicitly if not explicitly, defines segregation as a disciplinary classification and separate confinement as an administrative classification. The only significant difference is that segregation inmates have at least 2 hours of day out of their cells as opposed to 3 hours a day for separate confinement inmates. However, as will be apparent, confinement in the Secure Living Unit is not

considered to be separate confinement unless the inmate is placed there pursuant to ss. 20 – 21 of the *Corrections Regulation.*

WCC Policy Manual B4.6 - Secure Living Unit

Statement of Policy:

This policy describes the routine operation of the Secure Living Unit, including the classification of inmates, their rights, and the daily routine.

Definitions:

Secure Living Unit (SLU): a secure living unit in a correctional centre that is separate from other living units, with higher levels of observation, security and resistance to damage, intended to house those male inmates who cannot cohabitate with other individuals or classes of inmates, or those requiring a level of monitoring not available elsewhere in the centre.

Provisions:

Placement of Inmates to Secure Living Unit

1. Criteria for the placement of inmates to Secure Living Unit includes but is not limited to:

   1.1. The person in charge may authorize the placement of an inmate(s) into Secure Living Unit at any time when there is risk, or perceived risk, to the safety, security and good order of the correctional centre;
   1.2.
   1.3. The Person In Charge, or designate under the Authority Matrix, may place inmates on separate confinement under the provisions of section 20, 21 or 22 of the *Corrections Act* Regulations;

   1.4. The Person In Charge may designate Secure Living Unit to house inmates placed on segregation under the provisions of s. 28 and 33 of the *Corrections Act* Regulations;

   …

> 2. Upon placement, a Case Manager or MCS will complete the SLU Placement Form which will outline:
>
> 2.1. rationale for the inmates placement in the Secure Living Unit;
>
> 2.2. unit Rules;
>
> 2.3. access to Services (including allowable/restricted items); and
>
> 2.4. the process for requests to return to a regular unit.
>
> …

[94] The following is another example of redaction in the WCC Policy Manual:

> Operating the Secure Living Unit
>
> 23. Unit staff shall ma[redacted]

[95] In my view, the Secure Living Unit policy explicitly permits the placement of inmates to the Secure Living Unit according to the separate confinement provisions of ss. 20, 21 and 22 of the *Corrections Regulation* or the disciplinary procedure pursuant to ss. 28 – 33 of the *Corrections Regulation.* What is omitted in both the WCC Policy Manual and the practice of WCC with Mr. Sheepway is any reference to the procedural rights of separate confinement inmates in s. 21(3) requiring reasons in writing, s. 21(4) permitting submissions by the inmate before confirming, varying or rescinding their decision and s. 21(5) requiring notifying the inmate with reasons in writing.

ISSUE 1: IS THE POLICY B4.6 CREATING THE SECURE LIVING UNIT AUTHORIZED UNDER THE *CORRECTIONS ACT* OR *CORRECTIONS REGULATION,* OR IS IT BEYOND THE POWER CONFERRED?

[96] This issue is essentially one of interpreting the *Corrections Act* and the *Corrections Regulation*. In other words, can the Secure Living Unit be created in the WCC Policy Manual or must it be created in the *Corrections Act* and the *Corrections Regulation*?

[97] In *Rizzo v. Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, para 21 ("*Rizzo Shoes*"), the Supreme Court of Canada references Driedger's modern principles of statutory interpretation which states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[98] Sections 10 and 12 of the *Interpretation Act*, S.Y. 2002, c. 125, state respectively:

> 10. Every enactment and every provision thereof shall be deemed remedial and shall be given the fair, large, and liberal interpretation that best insures the attainment of its objects.
>
> …
>
> 12 If an enactment confers power to make regulations or to grant, make, or issue an order, writ, warrant, scheme, or letters patent, expressions used therein shall, unless the contrary intention appears, have the same respective meanings as in the enactment conferring the power.

[99] While the plain meaning of words may still be considered, *Rizzo Shoes* mandates an interpretation that considers the scheme of the *Corrections Act* and the

Corrections Regulation, the object of the *Corrections Act* and the context of the words used.

[100] Counsel for Yukon submits that s. 51(f) of the *Corrections Act* permits Yukon to establish regulations respecting the separate confinement of inmates and that has been done in ss. 20 and 21 of the *Corrections Regulation*. However, because the *Corrections Act* and the *Corrections Regulation* do not contain a specific definition of separate confinement, counsel for Yukon submits that authority has been granted to the person in charge under ss. 14(1)(a) and 15 to ensure the safe, secure and efficient operation of WCC.

[101] Counsel further submits that the principle in s. 2(h) of the *Corrections Act* to use the least restrictive measures with offenders, permits the person in charge to create an "in-between" living arrangement that is neither general population nor separate confinement but yet secure.

[102] Counsel for Yukon also relies on the Supreme Court of Canada decision in *May v. Ferndale Institution*, 2005 SCC 2 ("*Ferndale Institution*"), at para. 82, which quoted McLachlin J. in *Cunningham v. Canada,* [1993] 2 S.C.R. 143 at p. 152:

> [O]ur system of justice has always permitted correctional authorities to make appropriate changes in how a sentence is served, whether the changes relate to place, conditions, training facilities, or treatment. Many changes in the conditions under which sentences are served occur on an administrative basis in response to the prisoner's immediate needs or behaviour. Other changes are more general. From time to time, for example, new approaches in correctional law are introduced by legislation or regulation. These initiatives change the manner in which some of the prisoners in the system serve their sentences.

[103] Counsel for Mr. Sheepway submits that the creation of the Secure Living Unit can only be done under the *Corrections Regulation* of separate confinement or segregation granted under s. 51(f). Thus, he submits that Policy B4.6 creating the Secure Living Unit is beyond the power of the *Corrections Act.*

[104] Counsel for Mr. Sheepway also submits that the Secure Living Unit is a seemingly innocuous label for incarceration that is in effect separate confinement resulting in an overuse of administrative segregation without procedural safeguards provided in the *Corrections Regulation*. He submits that WCC by its WCC Policy Manual separates inmates from the general population, using the Secure Living Unit label, which has no legal validity and contravenes the principles of fundamental justice.

[105] Counsel for Yukon candidly acknowledges that if the Secure Living Unit is separate confinement, Yukon is not authorized to create rules or policy B4.6 for the Secure Living Unit pursuant to ss. 14 and 15 of the *Corrections Act* but must do so under the *Corrections Regulation* and s. 51(f) of the *Corrections Act*. In other words, Counsel for Yukon agrees that Yukon cannot create what is effectively separate confinement and call it the Secure Living Unit without applying the procedural safeguards.

ANALYSIS

Interpretation of the *Corrections Act*, the *Corrections Regulation*, and the WCC Policy Manual

[106] I find the following from my review of the *Corrections Act*, the *Corrections Regulation* and the WCC Policy Manual:

1. The creation of the Secure Living Unit by way of the WCC Policy Manual is beyond the power (*ultra vires*) of the *Corrections Act* and *Corrections Regulation*.
2. The Secure Living Unit is separate confinement meaning the separate confinement of inmates from the general population of WCC.
3. The policy and practices of WCC have breached ss. 2(g), 2(h), 15(1), and 15(2) of the *Corrections Act* and ss. 20 – 21 of the *Corrections Regulation.*

[107] In my view, the *Corrections Act* makes a clear statement in s. 51(f) that separate confinement and segregation are to be set in regulation, not policy or rules under ss. 14 and 15 of the *Corrections Act.*

[108] There is a valid reason for the use of regulations to establish the terms and conditions of depriving inmates in the general population of their residual liberty in a correctional centre. Regulations, pursuant to the *Regulations Act*, R.S.Y. 2002, c. 195, are made by the Commissioner in Executive Council who acts on behalf of Cabinet or the Executive. Regulations are filed with the registrar of regulations who must provide a copy to each member of the Legislative Assembly.

[109] In contrast, s. 15 of the *Corrections Act* permit the person in charge of WCC, subject to the approval of the Director of Corrections "to establish rules" for "the safe, secure and efficient operation of the correctional centre", among other things. The authority to make rules is an internal function for the operation of a correctional centre. It is explicitly subject to the *Corrections Regulation* determination of separate confinement and segregation. It is also my view that the creation of the Secure Living Unit in the WCC Policy Manual has resulted in WCC choosing to use confinement in the Secure

Living Unit rather than the Separate Confinement regulation, thereby avoiding the procedural safeguards for inmates in s. 21 of the *Corrections Regulation.*

[110] It is also significant that ss. 14 and 15 of the *Corrections Act* do not make any reference to separate confinement or segregation. Nor do ss. 14 and 15 refer explicitly to discipline or administrative restrictions. The rule-making power in ss. 14 and 15 is subordinate to the regulatory power under s. 51(f) of the *Corrections Act* and cannot be used to create different forms of separate confinement or segregation.

[111] Giving the *Corrections Act* a large and liberal interpretation, one could conclude that the person in charge must be permitted to create the living conditions, such as the Secure Living Unit, which Yukon submits is not separate confinement or segregation. In my view, there are several reasons that do not permit such a broad interpretation.

[112] The first consideration is the obvious point that s. 15 refers to “rules” not policy. While that may be a somewhat technical consideration, the WCC Policy Manual can be redacted or changed at any time by an internal WCC process, rather than in the *Corrections Act* and *Corrections Regulation.*

[113] Counsel for Yukon relies upon the quote from *Ferndale Institution*, to support the interpretation that the rule-making power in s. 15 permits the person in charge and the Director of Corrections to impose a definition of “separate confinement” that excludes the Secure Living Unit. But that authority clearly requires that “new approaches in correctional law are introduced by legislation or regulation”.

[114] In the case at bar, I have concluded that the large and liberal interpretation does not permit Yukon to deprive inmates of their residual liberty rights by way of ss. 14 and 15 of the *Corrections Act*.

Separate Confinement or Segregation

[115] The lack of definitional clarity, or what I call the label trap, has bedevilled the laws of incarceration. For this reason, I have set out the views of Dr. Lohrasbe and Mr. Loukidelis in some detail.

[116] The starting point, in my view, must begin with the principle that "prolonged isolation" regardless of labels or terminology can lead to a host of negative consequences for any person's mental health. And, as Dr. Lohrasbe succinctly states, it is universally recognized that a person with pre-existing psychiatric disorders render the individual especially susceptible to the negative effects of isolation. Unfortunately, the people most negatively impacted are those whom it is most difficult to determine that isolation was the direct cause of further negative consequences.

[117] In my view, separate confinement denotes an individual's separation from the general prison population. In other words, the focus for the mental well-being of inmates should not be on the label or terminology but the procedural safeguards to ensure that the separate confinement is necessary and that it is subject to independent review to ensure that it is the least restrictive consistent with the protection of the public, staff members and offenders and subject to a fair process with an effective review.

[118] I also find that the physical layouts of the Segregation Unit and the Secure Living Unit are remarkably similar, as Mr. Sheepway expressed, except for the small television screen in the cells in the Secure Living Unit. What is important is the lack of meaningful human contact rather than the label attached.

[119] In the context of the *Corrections Act*, I do not find any significance in the use of the word "or" rather than "and" in the words "separate confinement or segregation". The

Interpretation Act states that “or” includes “and”. I find that segregation is a restricted form of separate confinement sometimes referred to as solitary confinement. The definition of solitary confinement is found in Rule 44 of the Nelson Mandela Rules:

> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

[120] Once again, it is the “without meaningful human contact” and the prolonged confinement that must be addressed.

[121] It is also noteworthy that Rule 37 of the Nelson Mandela Rules states:

> Rule 37
>
> The following shall always be subject to authorization by law or by the regulation of the competent administrative authority:
>
> …
>
> (d) Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation.

[122] There are two clear principles established by the Nelson Mandela Rule 37. Firstly, that it is involuntary separation that matters, not the label attached. Secondly, there is no distinction between disciplinary or administrative separate confinement, but rather the focus is on the conditions of involuntary separation.

[123] I conclude that the Secure Living Unit is separate confinement with a different label. It is notable that the WCC Policy Manual, in fact, defines Separate Confinement

status as the custody status of inmates "held in a cell within the Segregation Unit or the Secure Living Unit" so long as it is pursuant to ss. 20 – 23 of the *Corrections Regulation*. This confirms that both the Segregation Unit and Secure Living Unit are in fact separate confinement and in the case of Mr. Sheepway without procedural safeguards.

[124] Given that ss. 20 – 23 of the *Corrections Regulation* do not define separate confinement, WCC's own Policy Manual in the definition in B4.2 suggests that being held in a cell within the Secure Living Unit qualifies as separate confinement so long as the separate confinement label is selected. But unfortunately, WCC policy and practice is to label the separate confinement as confinement in the Secure Living Unit without the procedural safeguards. In my view, the status of separate confinement should not be left to the policy manual and the person in charge but rather be established in the *Corrections Act* and *Regulation.*

[125] Counsel for Yukon correctly submits that the two recent Court of Appeal decisions in Ontario and British Columbia are of limited precedential value as they focus on solitary confinement based on the Nelson Mandela Rules meaning confinement of prisoners for 22 hours or more without meaningful human contact and whether it amounts to cruel and unusual punishment in s. 12 of the *Charter of Rights and Freedoms.* See *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 2017 ONSC 7491, 2019 ONCA 243 ("*Canadian Civil Liberties Assn.*"); *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2018 BCSC 62, 2019 BCCA 228 ("*British Columbia Civil Liberties Assn.*"). Nevertheless, both cases provide useful guidance. In

Canadian Civil Liberties Assn, the Court of Appeal, at para. 66, made the following comment with respect to administrative segregation:

> [66] … In principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness -- at least until the court has the benefit of medical and institutional expert evidence to address meaningful guidelines. This issue therefore remains to be determined another day.

[126] In the *British Columbia Civil Liberties Assn.* case, a similar comment is made at para. 185:

> The decision to keep an inmate in administrative segregation is an important one that carries with it the risk that the person so confined will suffer significant emotional harm which, in some cases, will be permanent. The risk of self-harm and suicide also increases with exposure to solitary confinement. The interests at stake are high. The procedural protections required must reflect the extent to which the decision affects an inmate's life, liberty and emotional security (*Baker* at para. 25). This factor also weighs heavily in favour of robust procedural fairness protections.

[127] However, although the case at bar is not about solitary confinement and the specific definition in the Nelson Mandela Rules, it is about separate confinement of inmates without meaningful human contact for substantial periods of each day for an extended period of time. In other words, once an inmate is removed from the general population, the conditions of separate confinement may lead to mental health issues or the exacerbation of existing mental health issues.

ISSUE 2: WAS MR. SHEEPWAY'S CONFINEMENT UNCONSTITUTIONAL IN THAT IT BREACHED MR. SHEEPWAY'S S. 7 *CHARTER* RIGHTS TO LIFE, LIBERTY AND SECURITY OF THE PERSON?

[128] I decline to do an analysis under s. 7 of the *Charter* as counsel for Yukon has conceded its failure to follow the principles of fundamental justice when depriving the inmates in the Secure Living Unit of their residual liberty in what may be described as a "prison within a prison". However, as Yukon proceeds to implement the procedural safeguards for the Secure Living Unit, hopefully there will be medical evidence and institutional expert evidence to address meaningful guidelines.

ISSUE 3: IS S. 21 OF THE *CORRECTIONS* REGULATION ENTITLED SEPARATE CONFINEMENT – LONGER TERM A BREACH OF S. 7 OF THE *CHARTER* OR INCONSISTENT WITH S. 2 OF THE *CORRECTIONS ACT* AND BEYOND THE JURISDICTION OF THE COMMISSIONER IN EXECUTIVE COUNCIL?

[129] I decline to do an analysis of s. 21 under s. 7 of the *Charter* because, on this record, there is no evidentiary basis to assess the rights of inmates which were not granted by WCC. This is not to suggest that it is appropriate to avoid such an analysis by merely denying that s. 21 is in play. However, counsel for Yukon concedes that it has to address the principles of fundamental justice before it places inmates in the Secure Living Unit. I leave a s. 7 analysis for another day.

SUMMARY

[130] To summarize, I make the following declarations:

1. WCC does not have the statutory authority in s. 15 of the *Corrections Act* to create the Secure Living Unit;

2. WCC cannot confine inmates in the Secure Living Unit without following the procedure set out in ss. 20, 21 and 22 of the *Corrections Regulation;*

3. The policy and practices of WCC have breached ss. 2(g), 2(h), 15(1), and 15(2) of the *Corrections Act* and ss. 20 – 21 of the *Corrections Regulation;*

4. The above declarations shall be stayed for a period of nine months to permit Yukon to enact or regulate the Secure Living Unit and a fair process and effective review procedure prior to and during the confinement of inmates in the Secure Living Unit. As this stay was not discussed fully, counsel are at liberty to apply.

[131] Counsel may bring the issue of costs to case management, if necessary.

_____

VEALE C.J.